88-1678

No.

Supreme Court, U.S.
FILED
APR 12 1989
JOSEPH F. SPANIOL, JR.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

RICHARD WALTON,
Petitioner,

VS.

SCOTT B. MERRIMAN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court below erred in analyzing an officer's qualified immunity by not considering any of the clearly established, factually similar federal or state law in effect on July 17, 1986, as required by *Anderson v. Creighton,* 483 U.S. ____, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987), when it ruled that no reasonable police officer could have believed there was probable cause to effect a warrantless arrest after an eyewitness reported a kidnapping.

2. Whether the court below erred by not considering all the information possessed by the arresting officer, as required by *Anderson.*

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OCTOBER TERM, 1988

RICHARD WALTON,
Petitioner,

VS.

SCOTT B. MERRIMAN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, Richard Walton, respectfully prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on September 7, 1988.

OPINION BELOW

The opinion of the Court of Appeals, reported at 856 F.2d 1333 (9th Cir. 1988), appears in the Appendix hereto. No opinion was rendered by the District Court for the Northern District of California.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on September 7, 1988. A timely petition for rehearing *en banc* was denied on January 13, 1989, and this petition for writ

of certiorari was filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 42:

> § 1983. *Civil Action for Deprivation of Rights.* Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

United States Constitution, Amend. IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF CASE

Scott B. Merriman was arrested by petitioner Richard Walton, a Deputy Sheriff employed by the Sheriff's Department of Humboldt County, California, on suspicion of having kidnapped Wendy Cantrell. (CR 24)[1] The Humboldt County Sheriff's Department first received information of the kidnapping at about 11:00 p.m. on July 16, 1986, when Ms. Cantrell's half-brother, William Ivey, telephoned the Sheriff's Department. (*Id.*)

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[1] All citations are to the Clerk's Record before the Ninth Circuit Court of Appeals.

Deputy Richard Walton was dispatched to Ivey's residence. (*Id.*) Mr. Ivey told Deputy Walton that he had received a phone call from Ms. Cantrell's friend, Kim Martinez, and that Ms. Martinez had told him the following: Earlier that evening, she and Ms. Cantrell were together at the Clam Beach Inn, where they initially were confronted by Mr. Merriman. (CR 41) The two women left and Merriman followed their automobile until it stopped. (*Id.*) He then dragged Ms. Cantrell out of the vehicle. Ms. Cantrell kicked and screamed and directed Ms. Martinez to call the police. (*Id.*) Mr. Merriman then told Ms. Martinez, "You can call whoever you want, I've got keys to the cabin and that's where I'm taking her." (*Id.*)

Just before midnight on July 16, 1986, Sergeant James Marler contacted Ms. Martinez by telephone. (CR 23) She was coherent and very concerned about Ms. Cantrell's welfare. (*Id.*) Ms. Martinez told Sergeant Marler she and Ms. Cantrell had been driving her car near Clam Beach. (*Id.*) She stopped the car so that Ms. Cantrell could speak with her ex-boyfriend, Scott Merriman. (*Id.*) As they were talking, she observed Mr. Merriman take hold of Ms. Cantrell's arm and start pulling her toward his car. (*Id.*) She heard Mr. Merriman say he was going to take her to "the cabin," and she then heard Ms. Cantrell say she did not want to go. (*Id.*) Ms. Cantrell yelled to Ms. Martinez, telling her to get Merriman's license number and to call the police. (*Id.*)

After receiving the information from Ms. Martinez, either Sergeant Marler or the office radio dispatcher informed Deputy Walton that the eyewitness had verified the kidnapping. (CR 24) Deputy Walton had no reason to disbelieve the reported information. (*Id.*)

Prior to going off duty at 2:00 a.m., Deputy Walton checked Merriman's residence. (*Id.*) Merriman's car was not there and the house was unoccupied. (*Id.*) Because neither Merriman nor Ms. Cantrell could be found, he requested a county-wide all points bulletin. (*Id.*)

Deputy Walton returned to work at about 4:00 p.m. on July 17, 1986. (*Id.*) He learned that earlier in the morning Officer Kirkpatrick had been unable to locate either Mr. Merriman or

Ms. Cantrell. (*Id.*) Deputy Walton was also advised that Merriman had contacted the Sheriff's Office and informed them he would be at his residence after 5:00 p.m. (*Id.*)

Deputy Walton went to Merriman's residence and he was not there. (*Id.*) He then went to Mr. Ivey's residence, and Mr. Ivey told him the following: Mr. Ivey had seen his sister at about noon on that day. (CR 41) Her nose was scratched and she had a cut over her eye. She said she had spent the night at a cabin at Elaine Howell's, she had been "messed up on booze and drugs," and she did not remember what happened. (*Id.*) Ms. Cantrell left at about 2:00 p.m. without saying where she was going. (*Id.*)

After speaking with Mr. Ivey, Deputy Walton went to Ms. Howell's residence. (CR 24) Ms. Howell told him Merriman was inside and she invited him in. (*Id.*) While talking with Deputy Walton, Merriman admitted spending the night with Ms. Cantrell at a vacant house located below the Howell residence. (*Id.*) He admitted to closely following Ms. Martinez and Ms. Cantrell after they left the Clam Beach Inn, and he admitted that he told Ms. Cantrell to get into his car, although he claimed Ms. Cantrell had done this voluntarily. (*Id.*) Mr. Merriman stated that Ms. Cantrell and Ms. Martinez had been fighting. (*Id.*)

Deputy Walton then arrested Mr. Merriman for kidnapping. (*Id.*) At that time, Deputy Walton had been unable to find Ms. Cantrell and he knew of no one from the sheriff's department who had contacted her. (*Id.*)

Merriman was booked into the Humboldt County Jail at approximately 6:15 p.m. on July 17, 1986. On July 18, 1986, Detective Vulich of the Humboldt County Sheriff's Department received a call from Ms. Cantrell at about 3:25 p.m. (CR 25, Ex. A) She stated she "did not want to pursue prosecution" and said she would get a restraining order to keep Merriman away from her.[2] (*Id.*) Detective Vulich discussed the matter with a

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[2] Ms. Cantrell claimed at her deposition that she contacted the sheriff's department at about 2:00 p.m. on July 17, 1986, informing them that she had not been kidnapped but stating she would seek a restraining order to keep Merriman away from her.

deputy district attorney and the decision was made to release Merriman. (*Id.*) He was thereafter released from the Humboldt County Jail on July 18, 1986. (CR 43)

Mr. Merriman sued Deputy Walton, Deputy Marler, Humboldt County Sheriff Dave Renner, and Humboldt County, seeking compensatory and punitive damages. (CR 1) Mr. Merriman alleged violation of 42 U.S.C. § 1983 (1982), claiming his warrantless arrest was made without probable cause and claiming the county had a custom and policy of permitting unlawful arrests. (*Id.*)

All defendants moved for summary judgment, arguing the defendant officers had probable cause and, alternatively, that the defendant officers were entitled to judgment based upon qualified immunity. (CR 19-26) Without discussion of the law or facts, the district court denied defendants' motion, finding the existence of triable issues of fact. (CR 44)

The question of qualified immunity was appealed. The Ninth Circuit Court of Appeals affirmed the district court's ruling, stating a reasonable police officer, knowing what Walton knew, could not have believed there was probable cause for Merriman's warrantless arrest. The court analyzed the "totality-of-the-circumstances" to determine the existence of probable cause, citing *Illinois v. Gates* 462 U.S. 213, 238 (1983). However, the court failed to consider any factually similar federal or state law in order to ascertain the clearly established law for warrantless arrests based upon the report of an eyewitness. Further, the court did not consider the fact that Ms. Cantrell returned home with a cut over her eye and a scratched nose, thereby appearing to be a victim of violence.

Defendants thereafter filed a timely petition for rehearing *en banc*. This petition drew the court's attention to the omission of a material fact from its opinion—that Ms. Cantrell appeared injured when she briefly returned home after the alleged kidnapping. The petition also raised the fact that the court overlooked "clearly established law" holding that an eyewitness to a crime is considered a reliable informant for the purpose of establishing probable cause for a warrantless arrest, even though that person's

reliability has not been proven or tested. Defendant's petition for rehearing was denied January 13, 1989.

Merriman then filed a motion for summary judgment on the issue of liability, basing the motion upon the decision of the Ninth Circuit in the case. He contended that the Ninth Circuit determined, as a matter of law, that there was no probable cause for the arrest and summary judgment in his favor was mandated. The district court deferred to the opinion of the Ninth Circuit and granted Merriman summary judgment against Deputy Walton on the issue of liability, stating the following:

> The Ninth Circuit therefore asked itself this question: Could a reasonable police officer have believed that he was not violating clearly established law, i.e., that probable cause did exist? In order to rule on this matter, the court had to determine the clearly established law. This in turn resulted in a finding that, in the circumstances of this case, it was clearly established law that probable cause to arrest did not exist. (*Id.*)
>
> Defendants, in attempting to show a dispute exists over material facts, refer to case law which they assert establishes probable cause under similar factual circumstances as those alleged by defendant. However, in *Merriman,* the Ninth Circuit, with all disputed and undisputed facts before it, established that there could be no probable cause in *these exact* circumstances. Needless to say, the court must find *Merriman* more persuasive than other authority cited by defendant. It should be added that, since then, no new exculpatory evidence has been offered by defendant Walton.
>
> Defendants do point to one circumstance, which was in the record, which they claim was not considered by the Ninth Circuit in its opinion. They assert that defendant Walton had some indication that Ms. Cantrell, the alleged victim, was injured the night before. However, under the standard for probable cause established by the Ninth Circuit in *Merriman,* this court finds such a fact to be immaterial. Moreover, since the Ninth Circuit made its finding as to probable cause with the full record before it, any information which did not appear in their discussion of the case only

further indicates its immateriality as to the standard established for probable cause.[3]

In addition to granting plaintiff summary judgment against Deputy Walton on the issue of liability, the district court granted defendant's motion to vacate the trial date pending this court's decision on granting certiorari.

ARGUMENT

1. THE COURT BELOW FAILED TO CONSIDER THE "CLEARLY ESTABLISHED LAW," AS REQUIRED BY *ANDERSON V. CREIGHTON*, WHEN IT RULED DEPUTY WALTON WAS NOT ENTITLED TO QUALIFIED IMMUNITY.

In *Anderson v. Creighton*, 483 U.S. ____, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987), the Supreme Court of the United States advanced a two-step legal analysis for determining whether a governmental official is entitled to qualified immunity. First, the reviewing court must determine whether, at the time of the alleged incident, the right an official is alleged to have violated was "clearly established." *Anderson, supra*, 97 L.Ed.2d at 531. Whether a right is "clearly established" must be considered in a particularized and relevant sense, rather than at a level of generality only addressing abstract rights. *Anderson, supra*, 97 L.Ed.2d at 530-531.

Once a court has determined the clearly established law, the second step in the analysis is the "objective (albeit fact-specific) question" whether a reasonable officer could have believed [the action was lawful], in light of clearly established law and the information possessed by the official. See *Anderson, supra*, 97 L.Ed.2d at 532.

To determine whether a right is clearly established, a court must review all available factually similar law in existence when the alleged right was violated. Without review of existing law, there is simply no way a reviewing court can determine whether

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[3] The district court's order was filed March 17, 1989.

the unlawfulness of an official's conduct would be apparent to a reasonable official. See, e.g., *Anderson, supra*, 97 L.Ed.2d at 531. The Ninth Circuit Court of Appeals has adopted this procedure in cases not involving warrantless arrests based upon an eyewitness report. See, *Tribble v. Gardner*, 860 F.2d 321 (9th Cir. 1988); *Vaughan v. Ricketts*, 859 F.2d 736 (9th Cir. 1988); *Walnut Properties, Inc. v. City of Whittier*, 861 F.2d 1102 (9th Cir. 1988). *Ward v. County of San Diego*, 791 F.2d 1329, 1332 (9th Cir. 1986), cert. denied, ____ U.S. ____, 107 S.Ct. 3263, 97 L.Ed.2d 762 (1987) ("[I]n the absence of binding precedent, a court should look to all available decisional law including decisions of state courts, other circuits and district courts to determine whether the right was clearly established."). Other courts of appeals have also closely scrutinized the existing established law. See, *Alvarado v. Picur*, 859 F.2d 448 (7th Cir. 1988); *Tarantino v. Baker*, 825 F.2d 772 (4th Cir. 1987).[4]

In the instant case, the court below did little more than assert a general, abstract right to be free except upon showing of probable cause to arrest. The court's sole review of preexisting law was limited to defining the probable cause standard, as follows:

> "Probable cause is determined by applying a 'totality-of-the-circumstances' analysis. *Illinois v. Gates*, 462 U.S. 213, 238 (1983). Probable cause requires 'a probability or substantial chance of criminal activity.'" (*Id.* at 243 n. 13.) (See, p. A- 4 of Appendix hereto.)

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[4] There is a conflict between the circuits as to who bears the burden of showing that the law was clearly established. The Ninth Circuit places the burden of proof on the good faith immunity upon the defendant. *Guerra v. Sutton*, 783 F.2d 1372, 1374 (9th Cir. 1986). Other Circuit Courts of Appeal take the position that once a defendant properly raises the issue of qualified immunity, plaintiff has the burden of showing that the law was clearly established. *Hynson v. City of Chester*, 827 F.2d 932 (3rd Cir. 1987), cert. denied, 108 S.Ct. 702 (1988); *Whatley v. Philo*, 817 F.2d 19 (5th Cir. 1987); *Dominique v. Telb*, 831 F.2d 637 (6th Cir. 1987); *Alvarado v. Picur*, 859 F.2d 448 (7th Cir. 1988); *Lutz v. Weld County School District*, 784 F.2d 340 (10th Cir. 1986).

The court failed to consider numerous cases decided before July 17, 1986, both state and federal, which have held that information furnished by an eyewitness or victim is generally sufficient to establish probable cause, even though that person's reliability has not been proven. See, *McKinney v. George*, 726 F.2d 1183 (7th Cir. 1984)*†;[5] *Barnes v. Dorsey*, 480 F.2d 1057 (8th Cir. 1973), aff'g. 354 F.Supp. 179 (E.D. Mo. 1973)†; *United States v. Al-Azzawy*, 784 F.2d 890 (9th Cir. 1985), cert. denied, ____ U.S. ____, 106 S.Ct. 2255, 90 L.Ed.2d 700 (1986)†; *Easton v. City of Boulder, Colo.*, 776 F.2d 1441 (10th Cir. 1985), cert. denied, ____ U.S. ____, 107 S.Ct. 71, 93 L.Ed.2d 28 (1986)†; *Goodson v. City of Atlanta, Ga.*, 763 F.2d 1381 (11th Cir. 1985), rehg. den., 770 F.2d 175 (1985)†; *Peo. v. Bevins*, 6 Cal.App.3d 421 (1970)*†; *Peo. v. Gardner*, 252 Cal.App.2d 320 (1967)*†. Further, California Penal Code § 836* provides that a police officer may make a warrantless arrest "whenever he has reasonable cause to believe that the person to be arrested has committed a felony, whether or not a felony has in fact been committed."

Based upon the foregoing clearly established law, the eyewitness report of Kim Martinez concerning the kidnapping and the eyewitness report of William Ivey concerning Ms. Cantrell's physical condition soon after the kidnapping provided sufficient facts for a reasonable officer to find probable cause to arrest Merriman. Petitioner is aware of no case precedent preexisting Merriman's arrest clearly establishing that probable cause based upon the eyewitnesses' reports was vitiated because of other facts before the officer (i.e. that Cantrell briefly returned home not knowing what had happened the night before, that Merriman was cooperative, that Merriman denied taking Ms. Cantrell against her will.) [6]

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[5] The symbol "*" indicates cases and statutes cited by Petitioner in his appeal to the Ninth Circuit, and the symbol "†" indicates cases cited by Petitioner in his petition for rehearing.

[6] In *Clay v. Conlee*, 815 F.2d 1164 (8th Cir. 1987)†, which was decided after Merriman was arrested, the court held a victim's report of crime was sufficient to establish probable cause and probable cause was

Governmental officials are immune from suit unless the law clearly proscribed the action taken. *Davis v. Scherer,* 468 U.S. 183, 191, 104 S.Ct. 3012, ____, 82 L.Ed.2d 139, 147 (1984); *id.*, at 198, 104 S.Ct. 3012, 82 L.Ed.2d 139 (Brennan, J., concurring in part and dissenting in part). By overlooking the clearly established law, the Ninth Circuit has adopted a generalized, less stringent analysis for determining an officer's qualified immunity in cases alleging an arrest without probable cause in violation of a person's Fourth Amendment rights. Such a test bears no relationship to the "objective legal reasonableness" forming the touchstone of *Harlow v. Fitzgerald,* 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 296 (1982).

The analysis used by the court below therefore violates the precept of *Anderson,* supra, and in the future will deny police officers of the full shield of qualified immunity.

Petitioner urges that had the Ninth Circuit considered the clearly established law, a reasonable officer, at a minimum, could have believed there was probable cause to arrest Merriman. Because the officer's action was not clearly unlawful, it is suggested that summary reversal is now in order.

2. THE COURT BELOW FAILED TO CONSIDER IN ITS OPINION ALL MATERIAL FACTS POSSESSED BY THE ARRESTING OFFICER.[7]

William Ivey told Deputy Walton that Wendy Cantrell had a cut over her eye and a scratched nose when she briefly returned home the day following the kidnapping. (CR 41) The Ninth Circuit did not include this important evidence of possible physi-

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not vitiated by an anonymous telephone tip inplicating another suspect or a telephone call from victim indicating she wanted to dismiss charges against alleged rapist.

[7] The court below also incorrectly recited facts in the case. Kim Martinez reported that Merriman was Cantrell's ex-boyfriend (CR 24); there is no evidence Deputy Walton knew Merriman was "Cantrell's long-time boyfriend." (See, infra, A-4) Further, there is no evidence Deputy Walton knew Merriman was "a local school teacher." (Id.) In fact, Merriman admitted at his deposition that he had no teaching credential and that he quit his teaching job in February 1985. (CR 42)

cal violence in its opinion, even though it was brought to the court's attention in Petitioner's brief on appeal and again in his petition for rehearing.

Thereafter, the district court granted Merriman partial summary judgment, after finding this evidence was immaterial under the standard for probable cause established by the Ninth Circuit. If so, the question is raised—how much evidence, of physical violence is necessary before an officer can arrest a suspect without fear of § 1983 liability, when the victim disappears as did Wendy Cantrell in the instant case?

The objective, fact-specific question whether an officer could have believed an arrest lawful is based upon the information possessed by the officer. *Anderson,* supra, at 97 L.Ed.2d 532. Petitioner respectfully suggests that evidence of violence is crucial to evaluating the objective reasonableness of an officer's actions and the Ninth Circuit erred by not including this evidence in its opinion.

3. THE DECISION BELOW WILL SIGNIFICANTLY IMPAIR POLICE OFFICERS IN THE DISCHARGE OF THEIR DUTIES, PARTICULARLY WHEN RESPONDING TO DOMESTIC DISPUTES.

The decision of the court below will have a far reaching effect upon all law enforcement officials throughout the Ninth Circuit, as well as elsewhere. If police officers cannot rely upon the reports of eyewitnesses or victims of crime in order to establish probable cause (the "clearly established" law before the opinion below was rendered), officers may fail to exercise their best judgment and make an arrest because of the threat of retaliatory lawsuits. In the realm of domestic violence, police officers are now exposed to civil liability for failing to arrest an alleged abuser, when the abuser thereafter inflicts further bodily injury or murders the innocent victim. See generally, *Balistreri v. Pacifica Police Dept.*, 855 F.2d 1421 (9th Cir. 1988); *Estate of Bailey by Oare v. County of York*, 768 F.3d 503 (3rd Cir. 1985); *Dudosh v. City of Allentown*, 665 Fed.Supp. 381 (E.D. Pa. 1987); *Thurman v. City of Torrington*, 595 F.Supp. 1521 (D. Conn. 1984).

Uncorrected, the case below will thrust police officers into "no win" situations when responding to reports of domestic violence. Officers will face civil liability for arresting an alleged abuser who claims innocence, based upon the urgent call for help from an abused spouse or cohabitant, or the witness of such domestic abuse, where the victim later denies the assault in order to protect the suspect. Further, officers are exposed to potential liability for not arresting an alleged abuser who claims innocence, should the abuser injure or murder the victim at a later date.

Because both alleged abusers and victims of abuse can potentially sue a police officer for violation of their civil rights, it is exceedingly important that the courts analyze the issue of qualified immunity consistently and properly. To this end, *Anderson v. Creighton,* 483 U.S. ____, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987), requires the lower courts to carefully scrutinize all factually similar federal and state law in existence at the time of the alleged violation of a constitutional right, whenever analyzing whether the law was sufficiently clear so that the unlawfulness of an officer's action is apparent. The failure of the Ninth Circuit to conduct the foregoing analysis at the proper level of specificity has effectively removed the shield of qualified immunity.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the opinion of the Ninth Circuit. It is respectfully suggested that summary reversal is in order.

Respectfully submitted,

MITCHELL, DEDEKAM & ANGELL

By JOHN M. VRIEZE, ESQ.
DALE A. REINHOLTSEN, ESQ.
Attorneys for Petitioner

April 11, 1989

Appendix A

Scott B. Merriman,
Plaintiff-Appellee,

v.

Richard Walton, Deputy Individually and in his capacity as a Deputy Sheriff for the County of Humboldt; Red Marler, Individually and in his official capacity as a Deputy Sheriff for the County of Humboldt; the County of Humboldt, State of California, Dave Renner, Sherif, in his official capacity as the Sheriff of Humboldt County, Defendants-Appellants.

No. 87-2382.

United States Court of Appeals,
Ninth Circuit,

Argued and Submitted April 11, 1988.

Decided Sept. 7, 1988.

John M. Vrieze, Mitchell, Dedekam & Angell, Eureka, Cal., for defendants-appellants.

Bernard C. De Paoli, Eureka, Cal., for plaintiff-appellee.

Appeal from the United States District Court for the Northern District of California.

Before Goodwin, Schroeder and Poole, Circuit Judges.

Goodwin, Chief Judge:

Defendants, Humboldt County sheriff officers, appeal the order denying their motion for summary judgment based upon their qualified immunity to the plaintiff's § 1983 action for wrongful arrest. We affirm.

Scott B. Merriman was arrested by a Humboldt County deputy on suspicion of having kidnapped Wendy Cantrell, his long-time girlfriend. The information leading to the arrest began to flow at 11 p.m. on July 16, 1986. Cantrell's half-brother, William Ivey, telephoned the sheriffs' department to report that his sister possibly had been kidnapped. Deputy Richard Walton was dispatched to Ivey's house. Ivey told Walton that he had received a

phone call from Cantrell's friend, Kim Martinez, and that Martinez had told him the following: Earlier that evening, she and Cantrell were together at the Clam Beach Inn when Merriman arrived and argued with Cantrell. When Martinez and Cantrell drove away, Merriman followed their automobile until it stopped. Merriman and Cantrell then struggled, and, as he forced her into his car, she told Martinez to call the police. Just before midnight, Sgt. James Marler contacted Martinez, who repeated her report to him.

Deputy Walton then checked Merriman's residence, observing that Merriman's vehicle was gone and that the house was unoccupied. Based on the information he had received, and upon his inability to find Merriman and Cantrell, Walton that night requested an all-points bulletin to other officers. Walton's shift ended at 2 a.m.

The next morning, another deputy sheriff was unable to locate either Merriman or Cantrell at either of their residences or at the elementary school where Merriman was a teacher. When Walton arrived at work around 4 p.m. that afternoon, he was advised that Merriman had phoned the sheriffs' department and told them that he would be at his residence after 5 p.m. Walton went to Merriman's home but did not find Merriman. Walton then went to Ivey's residence. Ivey told Walton that Cantrell had returned. Ivey repeated to Walton what Cantrell had told him, including her statement that she had spent the night at a cabin owned by Elaine Howell. Ivey said that Cantrell had told him that "she had been messed up on booze and drugs the night before and that she did not remember what had happened." He said that Cantrell had told him that she believed that there was an outstanding warrant for her arrest and that she had called a friend and left home around 2 p.m. without telling him where she was going.

Walton next proceeded to Howell's residence, where he saw Merriman's vehicle. Howell told him that Merriman was inside and invited him in. Merriman told Walton that he had followed Cantrell and Martinez and that the two women had gotten into a fight, which he had broken up. Merriman said that Cantrell voluntarily got into his car and that they had spent the night together. Walton then arrested Merriman. At that time, Walton

said, he knew of no one from the sheriffs' department who had contacted Cantrell. (Cantrell later made an uncorroborated statement that she called the sheriffs' department at about 2 p.m. that afternoon—in the presence of her mother and Ivey—to tell them that she had not been kidnapped and did not want to press charges against Merriman.)

Merriman was released from jail July 18, after Cantrell indicated that she did not wish to pursue prosecution. She did state her intent to obtain a restraining order to keep Merriman away. Merriman was never charged with any crime.

Merriman sued Walton, Marler, Humboldt County Sheriff Dave Renner, and Humboldt County, seeking compensatory and punitive damages. Merriman alleged a violation of 42 U.S.C. § 1983 (1982), claiming that his warrantless arrest was made without probable cause and that the county had a policy and custom of permitting unlawful arrests.

After seven months of discovery, all defendants moved for summary judgment under Fed.R.Civ.P. 56, arguing that the defendant officers had probable cause and, alternatively, that they reasonably belived that they had probable cause.

The district court denied the motion. The court characterized the question in terms of probable cause and an assertion of qualified immunity. The court found, without discussion of the facts, that the parties' papers demonstrated the existence of genuine issues of material fact.

Although orders denying summary judgment are generally not appealable, the denial of a claim of qualified immunity is an appealable "final decision" under 28 U.S.C. § 1291 (1982) to the extent that it turns on an issue of law. *See Mitchell v. Forsyth*, 472 U.S. 511, 528-30, 105 S.Ct. 2806, 2816-18, 86 L.Ed.2d 411 (1985); *White by White v. Pierce County*, 797 F.2d 812, 814-15 (9th Cir.1986).

Anderson v. Creighton, ____ U.S. ____, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987), sets forth the inquiry concerning the existence of a clearly established right under the fourth amendment: "The relevant question in this case . . . is the objective (albeit

fact-specific) question whether a reasonable officer could have believed [the plaintiff's] warrantless [arrest] to be lawful, in light of clearly established law and the information the searching officers possessed." *Id.* 107 S.Ct. at 3040; *see also Tomer v. Gates*, 811 F.2d 1240, 1242 (9th Cir.1987) (*quoting Guerra v. Sutton*, 783 F.2d 1371, 1374 (9th Cir.1986)) (finding that an officer was entitled to qualified immunity if he "acted under an objectively '*reasonable* (even if mistaken) belief that what [he was doing] was lawful' ") (emphasis in original).

Thus, the question here is whether a reasonable police officer, knowing what Walton knew, could have believed there was probable cause for Merriman's warrantless arrest. We think the answer is no.

Probable cause is determined by applying a "totality-of-the-circumstances" analysis. *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527 (1983). Probable cause requires "a probability or substantial chance of criminal activity." *Id*, at 243 n. 13, 103 S.Ct. at 2335 n. 13.

The information that Walton possessed at the time of Merriman's arrest was as follows: There was a report that Cantrell had been kidnapped, but since the time of that report, Walton had obtained additional information. Walton knew that the alleged victim of the kidnapping had returned. Walton knew that Merriman, the alleged perpetrator, was a local school teacher who was Cantrell's long-time boyfriend. Walton knew that Merriman had telephoned the police station and stated he was available for police questioning. When Walton contacted Merriman, Merriman was cooperative and volunteered his version of what had happened. Under these circumstances, there is no probable cause. A reasonable police officer would have made further inquiry before effecting a warrantless arrest.

The decision of the district court denying the defendants' motion for summary judgment based upon qualified immunity is affirmed.

AFFIRMED AND REMANDED.